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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HARRIS L. WINNS,

Plaintiff,

vs.

BLAKELY SOLOKOFF TAYLOR & ZAFFMAN,  
LLP, ANTHONY INTIL, CANDY MIELKE,  
JIM SALTER, MICHAEL MALLIE, JOHN P.  
WARD, ED TAYLOR, DAN DEVOS, DIANE  
ROBSON, LESTER VINCENT, STEVE  
ZELMAN, DAVE MONTOYA, KAREN WILSON,  
TAREK FAHMI, LAURA E. INNES, RONALD  
F. GARRITY, CHARLES WALL,

Defendants.

) Case No. C08 02622 JW

)  
) **NOTICE OF MOTION AND**  
) **MEMORANDUM IN SUPPORT**  
) **OF DEFENDANTS INNES &**  
) **GARRITY'S SPECIAL MOTION**  
) **TO STRIKE PLAINTIFF'S**  
) **COMPLAINT PURSUANT TO**  
) **CALIFORNIA CIVIL PROCE-**  
) **DURE CODE §425.16**

) Date: November 3, 2008

) Time: 9:00 a.m.

) Dept: Courtroom 8, 4<sup>th</sup> Floor

) Judge: Hon. James Ware

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on **November 3, 2008**, at 9:00 a.m. or as soon  
thereafter as the matter may be heard in Department 8 of the above-entitled court located at 2112  
Robert F. Peckham, Federal Building, United States Courthouse, 280 South First Street, San  
Jose, California, 95113-3002; telephone: (408) 535-5364, Defendants LAURA E. INNES and  
RONALD F. GARRITY will bring Defendants' Innes and Garrity's Special Motion to Strike  
Plaintiff's Complaint Pursuant to California Civil Procedure Code §425.16.

//

**STATEMENT OF RELIEF MOVANTS SEEK**

Defendants LAURA E. INNES and RONALD F. GARRITY (“Defendants”) seek this court to strike Plaintiff Harris L. Winns’ (“Plaintiff”) causes of action for Malicious Prosecution and Abuse of Process and therefore the entire Complaint against Defendants on file herein pursuant to California Civil Procedure Code §425.16, as the causes of action for Malicious Prosecution and Abuse of Process appear to be the only causes of action alleged against the moving Defendants. Defendants further seek this Court if this Motion is granted to order Plaintiff to pay the attorney’s fees and costs incurred by Defendants in making this motion in an amount to be determined after the Court’s decision upon application of the Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF DEFENDANTS INNES & GARRITY’S  
MOTION TO STRIKE PLAINTIFF’S COMPLAINT**

**TABLE OF CONTENTS**

	<b><u>PAGE NO.</u></b>
NOTICE OF MOTION.....	1
STATEMENT OF RELIEF MOVANTS SEEK.....	2
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS INNES & GARRITY’S MOTION TO STRIKE PLAINTIFF’S COMPLAINT.....	2
I. STATEMENT OF THE ISSUES TO BE DECIDED.....	5
II. STATEMENT OF RELEVANT FACTS.....	6
III. ARGUMENT: LEGAL ANALYSIS AND AUTHORITIES.....	8
A. Statutory authority for special Motion to Strike.....	8
B. A special motion to strike under California Civil Procedure Code §425.16 may be brought in federal court.....	9
C. To determine if the Defendant should prevail in an anti-SLAPP motion the Court applies a two-step process.....	9
D. Defendants’ actions in regard to the malicious prosecution and abuse of process allegations are petitioning activities which are protected by the anti-SLAPP statute.....	10

		<b><u>PAGE NO.</u></b>
1		
2	E. Plaintiff cannot establish a probability of	
3	success with respect to his claims against	
	Defendants.....	12
4	F. The Plaintiff cannot establish a probability	
5	of success in his claim for malicious prosecution.....	12
6	G. The Plaintiff cannot establish a probability	
	of success in his claim of abuse of process.....	14
7	H. Defendants are entitled to recover their	
8	attorney's fees and costs.....	16
9	IV. CONCLUSION.....	16

### **TABLE OF AUTHORITIES**

10		<b><u>PAGE NO.</u></b>
11		
12	<b><u>STATE CASES</u></b>	
13	<u>1-800 Contacts, Inc. v. Steinberg</u>	
	107 Cal.App.4th 568, 584 (2003).....	9
14	<u>A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc.</u>	
	137 Cal.App.4th 1118, 1126 (2006).....	11
15	<u>Briggs v. Eden Council for Hope &amp; Opportunity</u>	
16	19 Cal.4th 1106, 1113, 1123 (1999) .....	10
17	<u>Brown v. Kennard</u>	
	94 Cal.App.4th 40, 44 (2001).....	14
18	<u>Cantu v. Resolution Trust Corp.</u>	
19	4 Cal.App.4th 857, 886-887 (1992).....	14
20	<u>City of Cotati v. Cashman</u>	
	29 Cal.4th 69, 74-76 (2002).....	10
21	<u>Dowling v. Zimmerman</u>	
22	85 Cal.App.4th 1400, 1410 (2001).....	10
23	<u>Equilon Enterprises, LLC v. Consumer Cause, Inc.</u>	
	29 Cal.4th 53, 67 (2002).....	10
24	<u>Flores v. Emerich &amp; Fike</u>	
25	416 F. Supp.2d 885, 903 (E.D. Cal. 2006).....	11
26	<u>HMS Capital, Inc. v. Lawyers Title Co.</u>	
	118 Cal.App.4th 204, 213 (2004).....	13
27		
28		

	<b><u>PAGE NO.</u></b>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
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19	
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21	
22	
23	
24	
25	
26	
27	
28	

<u>Jacob B. v. County of Shasta</u> 40 Cal.4th 948, 956, (2007).....	16
<u>Kappel v. Bartlett</u> 200 Cal.App.3d 1457, 1467-68 (1988).....	15
<u>Kashian v. Harriman</u> 98 Cal.App.4th 892, 906 (2002).....	9
<u>Kibler v. Northern Inyo County Local Hosp. Dist.</u> 39 Cal.4th 192, 197 (2006).....	8
<u>Kolar v. Donahue, McIntosh &amp; Hammerton</u> 145 Cal.App.4th 1532, 1537 (2006).....	11
<u>Ludwig v. Superior Court (City of Barstow)</u> 37 Cal.App.4th 8, 19 (1995).....	11
<u>Mann v. Quality Old Time Service, Inc.</u> 120 Cal.App.4th 90, 103 (2004).....	12
<u>Navarro v. IHOP Properties, Inc.</u> 134 Cal.App.4th 834, 842- 843 (2005).....	10
<u>Navellier v. Sletten</u> 29 Cal.4th 82, 92 (2002).....	11
<u>Pfeiffer Venice Properties v. Bernard</u> 101 Cal.App.4th 211, 215 (2002).....	16
<u>Philipson &amp; Simon v. Gulsvig</u> 154 Cal.App.4th 347, 361-364 (2007).....	12
<u>Roberts v. Los Angeles County Bar Assn.</u> 105 Cal.App.4th 604, 614 (2003).....	9
<u>Rubin v. Green</u> 4 Cal. 4th 1187, 1193 (1993).....	15
<u>Rusheen v. Cohen</u> 37 Cal.4th 1048, 1065 (2006).....	16
<u>Siam v. Kizilbash</u> 130 Cal.App.4th 1563, 1570 (2005).....	11
<u>Stavropoulos v. Superior Court</u> 141 Cal.App.4th 190, 197 (2006).....	13
<u>Twyford v. Twyford</u> 63 Cal.App.3d 916, 924-926 (1976).....	15
<u>Umansky v. Urquhart</u> 84 Cal.App.3d 368, 371-372 (1978).....	15

	<u>PAGE NO.</u>
<u>Vogel v. Felice</u> 127 Cal.App.4th 1006, 1017 (2005).....	12
<b><u>FEDERAL CASES</u></b>	
<u>Barrett v. Negrete</u> 126 Fed. Appx. 816, 817 (9th Cir. Cal. 2005).....	13
<u>Chang v. Rockridge Manor Condo.</u> 2008 U.S. Dist. LEXIS 10595, 21-22 (N.D. Cal. Feb. 13, 2008).....	14
<u>Globetrotter Software, Inc. v. Elan Computer Group, Inc.</u> 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999).....	10
<u>Metabolife Intern., Inc. v. Wornick</u> 213 F. Supp.2d 1220 (S.D. Cal.2002).....	16
<u>Metabolife Intern., Inc. v. Wornick</u> 264 F.3d 832, 839 (9th Cir. 2001).....	9
<u>Robertson v. Northwest Administrators, Inc.</u> 1999 U.S. Dist. LEXIS 4238, 18 (N.D. Cal. Mar. 26, 1999).....	15
<u>Silverstein v. E360insight, LLC</u> 2008 U.S. Dist. LEXIS 36858, 19 (C.D. Cal. May 5, 2008).....	14
<u>United States, ex rel. Newsham v. Lockheed Missiles &amp; Space Co.</u> 190 F.3d 963, 973 (9 <sup>th</sup> Cir. 1999).....	9, 16
<u>Vess v. Ciba-Geigy Corp. USA</u> 317 F.3d 1097, 1110 (9th Cir. Cal. 2003).....	10
<b><u>STATUTES</u></b>	
California Civil Procedure Code §335.1.....	13
California Civil Procedure Code §425.16.....	Referred to throughout memo
Federal Rules of Civil Procedure 12 and 56.....	9

## **I. STATEMENT OF THE ISSUES TO BE DECIDED:**

This special motion to strike is made on the grounds that Plaintiff's causes of action for Abuse of Process and Malicious Prosecution arise from Defendants' valid exercise of the constitutional right to petition which is protected by the First Amendment to the United States Constitution, Article I of the California Constitution and by the litigation privilege. Since Plaintiff's causes of action for Abuse of Process and Malicious Prosecution arise from Defen-

dants' litigation-related and petitioning activity and because Plaintiff cannot establish a probability of success on his claims, California Civil Procedure Code §425.16 (the anti-SLAPP statute) requires the dismissal of Plaintiff's causes of action for Abuse of Process and Malicious Prosecution and therefore the entire complaint, against the moving Defendants.

Issue 1: The Court must decide whether the Defendants have made a prima facie showing that the acts of which the Plaintiff complains were taken in furtherance of the Defendants' rights of petition;

Issue 2: If the Defendants meet the burden stated above in Issue 1, the burden shifts to Plaintiff and the Court must decide whether Plaintiff has shown a probability of prevailing on the claim; and

Issue 3: If the Defendants prevail on this motion, the Court must award attorneys' fees and costs and determine the amount of attorneys' fees and costs to be awarded Defendants upon future application of the Defendants.

## **II. STATEMENT OF RELEVANT FACTS:**

On February 14, 2002, Defendant law firm Blakely, Sokoloff, Taylor & Zafman ("BSTZ") terminated Plaintiff Harris Winn's ("Plaintiff") employment (Compl., 8-11:23-13) after Plaintiff was involved in a verbal dispute with a co-worker. (Compl, 8:25-28.)

On April 10, 2002, BSTZ obtained a Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not be Issued ("temporary restraining order") against Plaintiff in the Superior Court of Santa Clara County, California. (Exhibit "A".) Prior to the hearing on the temporary restraining order BSTZ and Plaintiff, who was represented by an attorney (Compl., 17:22-23), entered into a Stipulated Order for Injunction (stipulated injunction) on May 6, 2002, set to expire by its own terms on April 30, 2005. (Exhibit. "B"; Compl., 26:1.) BSTZ was represented by Innes and Garrity (sometimes referred to herein collectively as "Defendants") in regard to the temporary restraining order and the stipulated injunction. (Exhibit "B"; Compl., 17:7-27; 38:25-27.)

On July 25, 2007, Plaintiff filed a complaint in the Superior Court of Santa Clara County, California against 16 defendants including Innes and Garrity alleging various causes of action

1 including those based on the action of Innes and Garrity in obtaining the temporary restraining  
2 order and the stipulated injunction. That lawsuit was dismissed as to Innes and Garrity upon the  
3 Court's granting of a Special Motion to Strike pursuant to California Code of Civil Procedure  
4 §425.16. Plaintiff refers to the state court litigation and the special motion to strike in his  
5 Complaint. (Compl., 53-58.)

6 The Plaintiff then commenced this litigation on May 23, 2008. (Compl., 1.)

7 In this complaint, Plaintiff appears to allege a variety of causes of action against BSTZ  
8 and the individual defendants other than Innes and Garrity. Those causes of action are based  
9 upon the termination of his employment, the investigation and security action taken by BSTZ  
10 and others after Plaintiff's termination, and the obtaining of the temporary restraining order and  
11 stipulated injunction. Neither Innes nor Garrity is alleged to be, and they never were, employers  
12 of Plaintiff.

13 Although Plaintiff does allege that "the term 'Defendants', where not otherwise qualified,  
14 shall refer to all named Defendants individually and collectively, and when used in conjunction  
15 with allegations of unlawful conduct, shall mean that each Defendant committed such act and/or  
16 is legally accountable for such act(s)..." (Compl., 8:6-13), Plaintiff makes minimal factual and  
17 directly identifiable allegations in relation with a potential cause of action regarding Innes and  
18 Garrity prior to the section in the Complaint entitled "CONTINUUM", which commences on  
19 page 53 of the Complaint. Specifically, prior to the "CONTINUUM" Plaintiff alleges that: Innes  
20 "attempted to console" Plaintiff's wife during a court proceeding (Compl., 17:13-19); advised  
21 Plaintiff's attorney that the restraining order would not affect Plaintiff's ability to obtain  
22 employment in April, 2002 (Compl., 17:21-27); and Innes knew or should have known that the  
23 restraining order would eventually cause an abundance of upheaval and unrest in his life  
24 (Compl., 18:6-9), Plaintiff also includes in his allegations a lengthy "Letter to Laura Innes."  
25 (Compl., 29-34:21-25.) The content of the "letter" appears to be Plaintiff's attempt to inform  
26 Innes of the action of BSTZ in regard to the Plaintiff's employment termination, the injunctive  
27 relief and what Plaintiff describes as the results of such action. In the "letter" there is no  
28 discernable allegation of a cause of action relating to Innes. Plaintiff alleges in regard to Garrity

1 that he told a court clerk that he needed “a workplace violence restraining order”. (Compl., 38-  
2 39:25-1.)

3 The allegations of the “CONTINUUM” specifically refer to the Innes and Garrity special  
4 motion to strike in the state court and state that these Defendants “did not have a right to  
5 maliciously prosecute or abuse the judicial process against me or anyone else while in the  
6 process of choosing whom to defend in addition to intentionally failing to corroborate Blakely-  
7 Sokoloff’s claims in the first instance.” (Compl., 53:11-15; emphasis in original.) Plaintiff does  
8 alleges that Innes and Garrity “did have a right to petition” on behalf of BSTZ. (Compl., 54-  
9 55:28-1.)

### 10 **III. ARGUMENT: LEGAL ANALYSIS AND AUTHORITIES:**

11 Although somewhat difficult to determine because of the ambiguity in the Complaint,  
12 Defendants have determined that Plaintiff has attempted to state causes of action against the  
13 Defendants for malicious prosecution and abuse of process. (Compl. 53:10-15.) Plaintiff bases  
14 those causes of action against Defendants in their role, as BSTZ’s counsel, in obtaining the  
15 temporary restraining order and the stipulated injunction. Thus, Defendants contend that  
16 Plaintiff’s causes of action trigger California Civil Procedure Code §425.16, the anti-SLAPP  
17 (Strategic Lawsuits Against Public Participation) statute, because the causes of action arise  
18 directly from Defendants’ petitioning conduct. Defendants also contend that once it is  
19 determined that Defendants were engaged in protected activity that Plaintiff will not be able to  
20 meet his burden of showing a probability of success regarding these causes of action.

#### 21 **A. Statutory Authority for Special Motion to Strike.**

22 California Civil Procedure Code §425.16 establishes a procedure for bringing a special  
23 motion to strike lawsuits that are brought primarily to chill the valid exercise of the consti-  
24 tutional rights of freedom of speech and petition for the redress of grievances. (Cal. Civil Proc.  
25 Code §425.16(a); Kibler v. Northern Inyo County Local Hosp. Dist., 39 Cal.4th 192, 197  
26 (2006). Further, Section 425.16 provides: “A cause of action against a person arising from any  
27 act of that person in furtherance of the person’s right of petition or free speech under the United  
28 States or California Constitution in connection with a public issue shall be subject to a special



1 motion to strike, unless the court determines that the plaintiff has established that there is a  
 2 probability that the plaintiff will prevail on the claim.” (Civ. Proc. Code §425.16(b)(1).

3 **B. A special motion to strike under California Civil**  
 4 **Procedure Code §425.16 may be brought in federal court.**

5 California's "anti-SLAPP statute was enacted to allow early dismissal of meritless first  
 6 amendment cases aimed at chilling expression through costly, time-consuming litigation."  
 7 (Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001).

8 Although Federal Rules of Civil Procedure 12 and 56 allow a litigant to test the  
 9 opponent's claims before trial, California's special motion to strike adds an additional, unique  
 10 weapon to the pretrial arsenal. It cannot be disputed that motions to strike a state law claim under  
 11 California's anti-SLAPP statute may be brought in federal court. (United States, ex rel.  
 12 Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9<sup>th</sup> Cir. 1999). As there is no  
 13 direct conflict between the Federal Rules and California Civil Procedure Code §§425.16 (b) and  
 14 (c), adopting California procedural rules serves the purposes of the Erie doctrine. (Ibid.)

15 **C. To determine if the Defendant should prevail in an**  
 16 **anti-SLAPP motion the Court applies a two-step process.**

17 To decide an anti-SLAPP motion, California Civil Procedure Code §425.16 requires the  
 18 trial court to undertake a two-step process. (Kashian v. Harriman, 98 Cal.App.4th 892, 906  
 19 (2002). First, the court must decide whether the defendant has made a prima facie showing that  
 20 the acts of which the plaintiff complains were taken in furtherance of the defendant's rights of  
 21 petition or free speech. (Ibid.)

22 Second, if the defendant meets its burden, the burden shifts to the plaintiff to show a  
 23 probability of prevailing on the claim. (Ibid.) “In order to establish the necessary probability of  
 24 prevailing, [a] plaintiff [is] required both to plead claims that [are] legally sufficient, and to make  
 25 a prima facie showing, by admissible evidence, of facts that would merit a favorable judgment  
 26 on those claims, assuming plaintiff's evidence were credited.” (1-800 Contacts, Inc. v.  
 27 Steinberg, 107 Cal.App.4th 568, 584 (2003). Further, to meet his or her burden in opposing the  
 28 motion, “a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce

competent, admissible evidence.” (Roberts v. Los Angeles County Bar Assn., 105 Cal.App.4th 604, 614 (2003)).

The Federal Courts also follow the two-step process. “A court considering a motion to strike under the [California] anti-SLAPP statute must engage in a two-part inquiry.” (Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1110 (9th Cir. Cal. 2003)). “First, a defendant ‘must make an initial prima facie showing that the plaintiff’s suit arises from an act in furtherance of the defendant’s rights of petition or free speech.’” (Ibid.; quoting Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999)). “Second, once the defendant has made a prima facie showing, ‘the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims.’” (Ibid.; quoting Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999)).

**D. Defendants’ actions in regard to the malicious prosecution and abuse of process allegations are petitioning activities which are protected by the anti-SLAPP statute.**

An “act in furtherance of a person’s right of petition or free speech...” includes any written or oral statement made before a legislative, executive, or judicial body, or any other official proceeding authorized by law, or in connection with an issue under consideration by such body or in such proceeding. (Civ. Proc. Code §425.16(e)(1) and (e)(2).) “When the defendant’s alleged acts fall under the first two prongs of Section 425.16, subdivision (e) (speech or petitioning before a legislative, executive, judicial, or other official proceeding, or statements made in connection with an issue under review or consideration by an official body), the defendant is not required to independently demonstrate that the matter is a ‘public issue’ within the statute’s meaning.” (Navarro v. IHOP Properties, Inc., 134 Cal.App.4th 834, 842- 843 (2005); see, also, Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106, 1113, 1123 (1999)). Additionally, the defendant is not required either to demonstrate that it was the plaintiff’s intent to chill the defendant’s speech or petitioning rights or to demonstrate that the plaintiff’s claim actually had a chilling effect on the exercise of such rights. (Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal.4th 53, 67 (2002); City of Cotati v. Cashman, 29 Cal.4th 69, 74-76 (2002)).

1 The anti-SLAPP statute expressly mandates that the statute “shall be construed broadly”.  
 2 (Civ. Proc. Code §425.16(a); Dowling v. Zimmerman, 85 Cal.App.4th 1400, 1410 (2001).  
 3 Nothing in the anti-SLAPP statute categorically excludes any particular type of cause of action  
 4 from being stricken pursuant to its provisions. (Navellier v. Sletten, 29 Cal.4th 82, 92 (2002).  
 5 The focus of the anti-SLAPP statute is not the form of plaintiff’s cause of action, but rather it is  
 6 on the defendant’s activity that gives rise to his asserted liability and whether that activity  
 7 constitutes protected speech or petitioning. (Ibid.)

8 The first step in the analysis is to determine whether the claim at issues “arises from”  
 9 protected activity. (Civ. Proc. Code §425.16(b).) For this step, “the critical consideration is  
 10 whether the cause of action is based on the defendant’s protected free speech or petitioning  
 11 activity.” (Navellier, supra, 29 Cal.4th at 89 (italics in original); see, also, Kolar v. Donahue,  
 12 McIntosh & Hammerton, 145 Cal.App.4th 1532, 1537 (2006) (a claim ‘arises from’ an act when  
 13 the act forms the basis for the plaintiff’s cause of action).) Filing a lawsuit or seeking admini-  
 14 strative action is an exercise of one’s constitutional right of petition and any statements made in  
 15 connection with litigation “arise from” protected activity under Section 425.16. (Ludwig v.  
 16 Superior Court (City of Barstow), 37 Cal.App.4th 8, 19 (1995). To be subject to the anti-  
 17 SLAPP statute, it is necessary only that the communication bear “some relation” to the lawsuit.  
 18 (A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 137 Cal.App.4th 1118, 1126  
 19 (2006).

20 The Anti-SLAPP statute explicitly covers the malicious prosecution cause of action as it  
 21 applies to “any written or oral statement or writing made before a . . . judicial proceeding.”  
 22 (Flores v. Emerich & Fike, 416 F. Supp.2d 885, 903 (E.D. Cal. 2006).

23 Furthermore, the Anti-SLAPP statute applies to abuse of process claims where the  
 24 underlying act arises from the exercise of the right to petition the courts for redress. (see Siam v.  
 25 Kizilbash, 130 Cal..App.4th 1563, 1570 (2005) (reasoning that a cause of action for abuse of  
 26 process is subject to the Anti-SLAPP statute because “it arises from the exercise of the right of  
 27 petition.”). (Flores v. Emerich & Fike, 416 F. Supp.2d 885, 904-905 (E.D. Cal. 2006).

28 It is difficult to determine the wrongful acts that are alleged by the Plaintiff against Innes

1 and Garrity. Therefore, it may be contended by the Plaintiff that the causes of action at issue in  
 2 this case are mixed in that they are based upon both protected and unprotected activity. Any  
 3 such contention by the Plaintiff is not sufficient for denial of this motion. Where a cause of  
 4 action alleges both protected and unprotected activity, the cause of action will be subject to the  
 5 anti-SLAPP statute unless the protected conduct is merely incidental to the unprotected conduct.  
 6 (Mann v. Quality Old Time Service, Inc., 120 Cal.App.4th 90, 103 (2004).

7 It is clear that Plaintiff's allegations of malicious prosecution and abuse of process  
 8 against Innes and Garrity arise from petitioning activity. Plaintiff's factual allegations regarding  
 9 Innes and Garrity relate to their participation in obtaining a temporary restraining order and  
 10 stipulated injunction against him. Any causes of action asserted against Innes and Garrity must  
 11 therefore necessarily arise from petitioning activity, i.e., statements and conduct related to filing  
 12 of the temporary restraining order and stipulated injunction. Accordingly, Defendants' activities  
 13 fall squarely within the plain language of the anti-SLAPP statute. Defendants therefore have  
 14 satisfied their burden under the first step of the anti-SLAPP statute analysis.

15 **E. Plaintiff Cannot Establish A Probability Of Success**  
 16 **With Respect To His Claims Against Defendants.**

17 Since all of Plaintiff's claims against Innes and Garrity arise from Defendants' actions in  
 18 furtherance of petitioning activity, the burden shifts to Plaintiff to show that he can establish a  
 19 probability of success with respect to these claims. The Plaintiff's claims against Defendants  
 20 are not sufficiently plead. (See, Philipson & Simon v. Gulsvig, 154 Cal.App.4th 347, 361-364  
 21 (2007) (plaintiff cannot show a probability of success where allegations are insufficient to  
 22 constitute a cause of action; Vogel v. Felice, 127 Cal.App.4th 1006, 1017 (2005) (plaintiff  
 23 cannot show a probability of success where claim is legally insufficient on its face). The  
 24 Plaintiff cannot make a prima facie showing by admissible evidence of facts that would merit a  
 25 favorable judgment on the claims. And furthermore, the claims are barred by the applicable  
 26 statute of limitations and in regard to the claim for abuse of process barred by the litigation  
 27 privilege. Thus, Plaintiff cannot meet his burden.

28 **F. The Plaintiff cannot establish a probability**  
**of success in his claim for malicious prosecution.**

1  
2 The Plaintiff's allegations supporting his contention of malicious prosecution (Compl.,  
3 54-60) by the Defendants are confusing. However, it appears that the Plaintiff alleges for this  
4 cause of action that the Defendants were: "negligent in screening the validity of a potential  
5 client's claims prior to accepting them; they've failed to enumerate and ascertain facts that  
6 would've been supportive of Blakely-Sokoloff's claims as well" (Compl. 55:2-6); and "if the  
7 Defendant had in place a screening process whereby potential clients are at least vigorously  
8 screened prior to accepting their claims at face value and apparently without scrutiny. . ."  
9 (Compl., 56:8-12.) These allegations are not sufficient to state a cause of action for malicious  
10 prosecution.

11 In California, an action for malicious prosecution has three elements. The plaintiff must  
12 establish that the prior underlying action (1) was commenced by or at the direction of the  
13 defendant and it was pursued to a legal termination in the plaintiff's favor; (2) was brought  
14 without probable cause; and (3) was initiated with malice. (Barrett v. Negrete, 126 Fed. Appx.  
15 816, 817 (9th Cir. Cal. 2005); citing HMS Capital, Inc. v. Lawyers Title Co., 118 Cal.App.4th  
16 204, 213 (2004). The Plaintiff does not plead these necessary elements.

17 Also, the Plaintiff cannot meet his burden to prove a probability of prevailing on the  
18 merits in regard to malicious prosecution. He cannot meet the first necessary element. He  
19 cannot show that the temporary restraining order and/or the stipulated injunction were pursued to  
20 a legal termination in the Plaintiff's favor. The temporary restraining order and the stipulated  
21 injunction was entered against the Plaintiff. (Compl., 58:10-12; 59:20-22; Exhibits "A" and  
22 "B".)

23 Furthermore, the Plaintiff's cause of action for malicious prosecution is barred by the  
24 statute of limitations. The statute of limitations for malicious prosecution in California has been  
25 established as a two-year period under California Civil Procedure Code §335.1 (for "injury to, or  
26 for the death of, an individual caused by the wrongful act or neglect of another"). (Cal. Civ.  
27 Proc. Code §335.1; Stavropoulos v. Superior Court, 141 Cal.App.4th 190, 197 (2006). Such a  
28 cause of action accrues at the time of entry of judgment in the underlying action in the trial court.

(Ibid.) An appeal from the judgment can alter the accrual of the cause of action. However, there was no appeal in the case at bar.

The temporary restraining order was entered on April 10, 2002, and the stipulated injunction was entered on May 6, 2002, both of which was more than six years prior to the filing of the Complaint in this matter. Therefore, the Plaintiff's cause of action for malicious prosecution is barred by the statute of limitations.

The Plaintiff cannot show a probability that he can prevail on his cause of action for malicious prosecution..

**G. The Plaintiff cannot establish a probability of success in his claim of abuse of process.**

The Plaintiff's allegations supporting his contention of abuse of process by the Defendants are difficult to ascertain. (Compl., 53:54; 60-63.) However, the gist of his allegations are that Defendants obtained the temporary restraining order and stipulated injunction as a result of "intentionally failing to corroborate Blakely-Sokoloff's claims in the first instance" (Compl., 53:13-15) and by a "shoddy screening process" (Compl. 60:12). These allegations by Plaintiff are not legally sufficient to support a probability of prevailing against Defendants on a cause of action for abuse of process.

"The tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed." (Brown v. Kennard, 94 Cal.App.4th 40, 44 (2001). "The elements of the tort of abuse of process are: 'that the defendant (1) contemplated an ulterior motive in using the process; and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings.'" (Silverstein v. E360insight, LLC, 2008 U.S. Dist. LEXIS 36858, 19 (C.D. Cal. May 5, 2008). The Plaintiff does not plead any of the necessary elements for abuse of process.

Furthermore, the Plaintiff's cause of action for abuse of process is barred by the statute of limitations. The statute of limitations for abuse of process is a two-year period under California Civil Procedure Code §335.1. (Chang v. Rockridge Manor Condo., 2008 U.S. Dist. LEXIS 10595, 21-22 (N.D. Cal. Feb. 13, 2008). The two-year period applies as abuse of process is an

1 injury to the person (Cantu v. Resolution Trust Corp., 4 Cal.App.4th 857, 886-887 (1992); citing  
2 former Cal. Civ. Proc. Code §340(3).

3 In abuse of process claims, courts have departed from the traditional commencement  
4 point (when the wrongful act occurred), to hold that, the discovery of the injury and its cause  
5 signify the accrual point from which the appropriate statute of limitations runs. (Robertson v.  
6 Northwest Administrators, Inc., 1999 U.S. Dist. LEXIS 4238, 18 (N.D. Cal. Mar. 26, 1999;  
7 citing Kappel v. Bartlett, 200 Cal.App.3d 1457, 1467-68 (1988).

8 From the allegations in the Plaintiff's Complaint it is evident that the cause of action for  
9 abuse of process accrued many years ago. BSTZ's request for the temporary restraining order  
10 was on April 9, 2002 (Exhibit "A") and the stipulated order was on May 6, 2002 (Exhibit "B").  
11 The Plaintiff's allegations show that much more than two years passed (almost six years) in  
12 regard to the accrual of the cause of action before he filed this Complaint on May 23, 2008. He  
13 alleges that:: "[He was] placed under a glowing light of humiliation and suspicion for 5 years  
14 (Compl. 20:28); "In fact, it [BSTZ plan] failed each and every day for five years . . . (Compl.  
15 22:17); "Prior to the 'order' lapsing, I hadn't been invited to an employment interview in (6)  
16 years" (Compl., 26:22-24); and "I was intentionally placed in a position . . . that essentially  
17 barred me from participating in the employment market for 5 years" (Compl., 39:18-19).  
18 Plaintiff certainly knew of his claimed injury years before he filed the complaint. In an e-mail to  
19 Innes dated August 29, 2005, Plaintiff states: ". . . it's been (3-1/2) years since your client,  
20 Blakely-Sokoloff, has injured my potential to provide for my family." (Compl., Exhibit E, p. 3.)

21 Finally, the Plaintiff cannot demonstrate a probability of overcoming application of the  
22 litigation privilege to his cause of action for abuse of process.

23 A complaint for abuse of process fails to state a cause of action when it shows on its face  
24 that it is based on a publication which is absolutely privileged under California Civil Code  
25 Section 47(b) because it was made in the course of a judicial proceeding. (See Umansky v.  
26 Urquhart, 84 Cal.App.3d 368, 371-372 (1978); Twyford v. Twyford, 63 Cal.App.3d 916,  
27 924-926 (1976). The application of the litigation privilege eliminates the threat of tort liability  
28 for communications made during judicial, quasi-judicial, legislative and other official



proceedings.

The litigation privilege applies notwithstanding a party's attempt to plead around this absolute barrier. (Rubin v. Green, 4 Cal. 4th 1187, 1193 (1993)). The litigation privilege has been described as absolute, regardless of malice and extending even to perjury. (Jacob B. v. County of Shasta, 40 Cal.4th 948, 956, (2007)).

The allegations of the Plaintiff's Complaint base the Defendants' liability on their obtaining of the temporary restraining order and the stipulated order. These are absolutely privileged actions. Where a court finds that there is no reasonable probability that a Plaintiff's abuse of process claim would prevail because any allegedly wrongful conduct was privileged it is proper to grant an anti-SLAPP motion. (Rusheen v. Cohen, 37 Cal.4th 1048, 1065 (2006)).

Therefore, the Plaintiff cannot show a probability that he can prevail on his cause of action for abuse of process.

#### **H. Defendants Are Entitled To Recover Their Attorney's Fees and Costs.**

Under the California anti-SLAPP statute, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Cal. Civ. Proc. Code § 425.16(c)). Thus, an award of attorney fees to a prevailing defendant on a special motion to strike is mandatory. (Pfeiffer Venice Properties v. Bernard, 101 Cal.App.4th 211, 215 (2002)).

The fee provision of the anti-SLAPP statute is applied in federal court. (Metabolife Intern., Inc. v. Wornick, 213 F. Supp.2d 1220 (S.D. Cal.2002); see also United States v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 972-73 (9th Cir. 1999) (the California anti-SLAPP statute should be applied in federal court as it is in state court.)).

Defendants request that should they prevail on this motion, the Court order the payment of their attorney's fees and costs with the amount to be determined upon the Defendants application for such attorneys' fees and costs.

#### **IV. CONCLUSION:**

The Court should grant the Defendants' special motion to strike the Plaintiff's Complaint pursuant to California Civil Procedure Code §425.16.

The only discernable causes of action plead in the Complaint against Defendants are



1 causes of action for malicious prosecution and abuse of process. The granting of the  
2 Defendants' motion in regard to those causes of action should result in the dismissal of the entire  
3 Complaint as to the Defendants.

4 In regard to the first issue for the Court's decision, the Defendants have met the burden  
5 of the first step in regard to prevailing on this motion by conclusively making a prima facie  
6 showing that the acts of which Plaintiff complains were taken in furtherance of the Defendants'  
7 rights of petition. Thus, the burden then shifts to the Plaintiff to show a probability of prevailing  
8 on the claim.

9 In regard to the second issue for the Court's decision, the Plaintiff has not shown a  
10 probability of prevailing on the claim by meeting of the requirements of pleading claims that are  
11 legally sufficient and by making a prima facie showing, by admissible evidence, of facts that  
12 would merit a favorable judgment on those claims.

13 The Defendants should prevail and should be awarded attorneys' fees and costs.

14  
15 DATED: September 4, 2008

Respectfully submitted,

16 DYER & WHITE LLP

17  
18 By s/CHARLES A. DYER  
19 CHARLES A. DYER  
20 Attorneys for Defendants  
LAURA E. INNES and RONALD  
F. GARRITY

**CERTIFICATE OF SERVICE****STATE OF CALIFORNIA, COUNTY OF SAN MATEO:**

I am a citizen of the United States; my business address is 800 Oak Grove Avenue, Suite 200, Menlo Park, California 94025. I am employed in the County of San Mateo where this mailing occurs. I am over the age of eighteen (18) years and not a party to the within cause. I served the within:

**NOTICE OF MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS INNES & GARRITY'S SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT PURSUANT TO CALIFORNIA CIVIL PROCEDURE CODE §425.16**

on the following person(s) on the date set forth below:

☒

**(VIA MAIL - CCP §§ 1013(a), 2015.5)** By placing a true copy thereof enclosed in a sealed envelope(s), addressed as below, and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the U.S. Postal Service and correspondence placed for collection and mailing would be deposited in the U.S. Postal Service at Menlo Park, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

☐

**(VIA PERSONAL DELIVERY -- CCP §§ 1011, 2015.5)** By placing a true copy thereof enclosed in a sealed envelope(s), addressed as below, and causing each envelope(s) to be hand delivered on that day by \_\_\_\_\_, in the ordinary course of my firm's business practice.

☐

**(VIA FACSIMILE -- CCP §§ 1013(e), 2015.5, CRC 2008)** By arranging for facsimile transmission from facsimile number 650-325-3116 to the facsimile number(s) listed below prior to 5:00 p.m. I am readily familiar with my firm's business practice of collection and processing of correspondence via facsimile transmission(s) and any such correspondence would be transmitted in the ordinary course of business. The facsimile transmission(s) was reported as complete and without error, and a copy of the transmission report is attached.

☐

**(VIA OVERNIGHT MAIL/COURIER - CCP §§1013(c), 2015.5)** By delivering a true copy thereof enclosed in a sealed envelope(s), addressed as below, to an authorized courier or driver authorized by Federal Express, an express service carrier to receive documents, in an envelope or package designed by Federal Express with delivery fees paid or provided for, addressed as below. I am familiar with my firm's business practice of collection and processing correspondence for overnight mail or overnight courier service, and my correspondence placed for collection for overnight delivery would, in the ordinary course of business, be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

Harris L. Winns  
2610 Sierra Vista Court  
San Jose, CA 95116  
Tele: 408-835-8872

In Pro Per

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9 Attorneys for Defendants Blakely Sokoloff Taylor &  
10 Zafman, LLP, Anthony Intil, Candy Mielke, Michael  
11 Mallie, John P. Ward, Ed Taylor, Dan Devos, Diane  
12 Robson and Lester Vincent

13 I declare that I am employed in the office of a member of the bar of this court at whose  
14 direction the service was made. Executed on September 4, 2008, at Menlo Park, California.

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s/DEBBIE RIFFEL  
DEBBIE RIFFEL

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Attorneys for Defendants  
Laura E. Innes and Ronald F. Garrity

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HARRIS L. WINNS,

Plaintiff,

vs.

BLAKELY SOLOKOFF TAYLOR & ZAFFMAN,  
LLP, ANTHONY INTIL, CANDY MIELKE,  
JIM SALTER, MICHAEL MALLIE, JOHN P.  
WARD, ED TAYLOR, DAN DEVOS, DIANE  
ROBSON, LESTER VINCENT, STEVE  
ZELMAN, DAVE MONTOYA, KAREN WILSON,  
TAREK FAHMI, LAURA E. INNES, RONALD  
F. GARRITY, CHARLES WALL,

Defendants.

) Case No. C08 02622 JW

) **[PROPOSED] ORDER GRANTING**  
) **DEFENDANTS INNES AND**  
) **GARRITY'S SPECIAL MOTION**  
) **TO STRIKE PLAINTIFF'S**  
) **COMPLAINT PURSUANT TO**  
) **CALIFORNIA CIVIL PROCE-**  
) **DURE CODE §425.16**

) Date: November 3, 2008

) Time: 9:00 a.m.

) Dept: Courtroom 8, 4<sup>th</sup> Floor

) Judge: Hon. James Ware

Defendants LAURA E. INNES and RONALD F. GARRITY's ("Defendants") Special Motion to Strike Plaintiff's causes of action for malicious prosecution and abuse of process and thus the entire Complaint pursuant to California Civil Procedure Code Section 425.16 came on regularly before this Court on November 3, 2008, the Honorable James Ware presiding. Charles A. Dyer appeared for Defendants and Harris L. Winns appeared in pro per.

After fully considering the moving and opposition papers and oral arguments, the Court finds as follows:

1 (1) Defendants made a prima facie showing that the acts of which Plaintiff complains  
2 in the Complaint for causes of action for malicious prosecution and abuse of process were taken  
3 in furtherance of Defendants right to petition;

4 (2) Plaintiff did not establish a probability that he will prevail on the causes of action  
5 for malicious prosecution and abuse of process;

6 Therefore,

7 IT IS HEREBY ORDERED THAT the Defendants' Special Motion to Strike pursuant  
8 to California Civil Procedure Code Section 425.16 is GRANTED and the causes of action  
9 against Defendants for malicious prosecution and abuse of process are hereby stricken.

10 Furthermore, as the only causes of action plead against the Defendants in the  
11 Complaint are the causes of action for malicious prosecution and abuse of process, which have  
12 been stricken, the entire Complaint against the Defendants is stricken.

13  
14 Dated: \_\_\_\_\_

\_\_\_\_\_  
HONORABLE JAMES WARE  
JUDGE OF THE UNITED STATES  
DISTRICT COURT

**CERTIFICATE OF SERVICE****STATE OF CALIFORNIA, COUNTY OF SAN MATEO:**

I am a citizen of the United States; my business address is 800 Oak Grove Avenue, Suite 200, Menlo Park, California 94025. I am employed in the County of San Mateo where this mailing occurs. I am over the age of eighteen (18) years and not a party to the within cause. I served the within:

**[PROPOSED] ORDER GRANTING DEFENDANTS INNES & GARRITY'S SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT PURSUANT TO CALIFORNIA CIVIL PROCEDURE CODE §425.16**

on the following person(s) on the date set forth below:

☒

**(VIA MAIL - CCP §§ 1013(a), 2015.5)** By placing a true copy thereof enclosed in a sealed envelope(s), addressed as below, and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the U.S. Postal Service and correspondence placed for collection and mailing would be deposited in the U.S. Postal Service at Menlo Park, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

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10 Zafman, LLP, Anthony Intil, Candy Mielke, Michael  
11 Mallie, John P. Ward, Ed Taylor, Dan Devos, Diane  
12 Robson and Lester Vincent

13 I declare that I am employed in the office of a member of the bar of this court at whose  
14 direction the service was made. Executed on September 4, 2008, at Menlo Park, California.

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s/DEBBIE RIFFEL  
DEBBIE RIFFEL